UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LOUISE H. COFFIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-374-P-C***
	)	
MARVIN RUNYON, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANTS' RENEWED MOTION TO SUBSTITUTE

In this action alleging sexual harassment and discrimination, infliction of emotional distress, deprivation of a property interest, and defamation, the defendants are the Postmaster General, an employee of the United States Postal Service ("USPS") who is sued only in his official capacity, and two USPS employees who are sued as individuals. The defendants move to substitute the United States for the two individual defendants pursuant to 28 U.S.C. § 2679(d)(1). I grant the motion in part and deny it in part.

I. Background

Counts IV, V, and VI of the complaint assert claims against the individual defendants, Barry Curtis and Gary Powers, employees of the USPS. Complaint (Docket No. 1) ¶¶ 5, 6, 14, 45-50, 52-54, 56-60. Count IV alleges intentional infliction of emotional distress, Count V alleges negligent infliction of emotional distress, and Count VI alleges defamation. These claims arise out of alleged

conduct by Curtis and Powers while the plaintiff's decedent, Judith A. Coffin, was employed in a supervisory position at the Portland Processing and Distribution Center of the USPS. *Id*. ¶¶ 2, 12, 14. In lieu of filing an answer on behalf of Curtis and Powers, the United States, on behalf of defendant Runyon, moved to substitute itself for the individual defendants pursuant to 28 U.S.C. § 2679(d)(1), appending to the motion the certification of the United States Attorney for the District of Maine that Curtis and Powers were acting within the scope of their employment at the time of the conduct alleged in the complaint. Docket No. 5.

This motion was denied by the court, with the following entry on the docket, on March 21, 1997:

> After full review of the written submission hereon the within motion is hereby DENIED without prejudice to its reassertion at trial or on a sufficient record being made in pretrial proceedings. SO ORDERED.

Id. The United States and all of the defendants filed the renewed motion to substitute, which is presently before the court, on April 4, 1997. Docket No. 12. The motion is accompanied by affidavits from Curtis and Powers. Docket Nos. 13 and 16. Curtis and Powers also filed answers to the complaint at the same time. Docket Nos. 15 and 17.

With her response to the renewed motion, the plaintiff filed affidavits of two of her lawyers, setting forth discovery proceedings to date and submitting copies of documents obtained in discovery to date, all but two of which postdate the events set forth in the complaint. Docket Nos. 20 and 21. The defendants' reply memorandum includes a supplemental affidavit from defendant Powers. Docket No. 24.

II. Analysis

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq*., provides that a suit against the United States shall be the exclusive remedy for persons with claims for damages arising from the actions of federal employees taken within the scope of their employment. 28 U.S.C. § 2679(b)(1). Substitution follows upon the certification of the Attorney General that the federal employee defendant was acting within the scope of his employment at the time of the incident giving rise to the claim. *Id*. § 2679(d)(1). The Attorney General has delegated her authority to issue such certifications to the United States attorneys. 28 C.F.R. § 15.3(a).

A scope-of-employment certification is reviewable by the court to which it is submitted. *Gutierrez de Martinez v. Lamagno*, 115 S.Ct. 2227, 2236 (1995); *Nasuti v. Scannell*, 906 F.2d 802, 803 (1st Cir. 1990). When the plaintiff objects to a motion to substitute based on such a certification, the burden is on the plaintiff to establish that the individual defendant was not acting within the scope of his employment at the relevant time. *Schrob v. Catterson*, 967 F.2d 929, 936 (3d Cir. 1992); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991). The defendants argue that the plaintiff has not met this burden because she has not presented any evidence on this issue. Challenges to certification "must be resolved before trial, as soon after the motion for substitution as practicable, even if an evidentiary hearing is needed to resolve relevant factual disputes." *Brown*, 949 F.2d at 1012. I conclude that this issue may be resolved on the materials submitted to the court and that an evidentiary hearing is therefore not necessary.

The question whether a federal employee was acting within the scope of his employment for purposes of the FTCA is governed by the law of *respondeat superior* of the state in which the alleged tortious conduct occurred. *Williams v. United States*, 350 U.S. 857, 857 (1955); *Nasuti*, 906 F.2d at 805 n.3. Maine has adopted the Restatement (2d) of Agency § 228 as the definition of the scope

of employment. *McLain v. Training & Dev. Corp*., 572 A.2d 494, 497-98 (Me. 1990). The Restatement provides, in relevant part, that conduct is within the scope of employment "if, but only if: (a) it is of the kind [the employee] is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master . . . ." The parties do not dispute that the actions at issue occurred during the time and space limits of the individual defendants' employment, satisfying the second element of this definition. The defendants apparently attempt to satisfy the third element of the definition by Powers' statement in his affidavit that, when he engaged in those activities to which he admits,[1] he was "trying to use humor to defuse a very tense working environment." Powers Affidavit (Docket No. 13) ¶ 9. The defendants do not expressly address the first element of the definition.

For purposes of this inquiry, the allegations in the complaint must be construed in the light most favorable to the plaintiff. *McHugh v. University of Vermont*, 966 F.2d 67, 74 (2d Cir. 1992). Both the plaintiff and the defendants treat the emotional distress claims in this action as totally based on the allegations of sexually harassing conduct by the individual defendants. While the plaintiff bears the burden on the challenge to certification, it is a burden that is easily satisfied when the very nature of the allegations in the complaint is grounded in conduct that is clearly outside the scope of the individual defendants' employment, as a matter of law. That is the case here. The plaintiff has pointed to "specific facts" that rebut the scope of employment certification, *Brown*, 949 F.2d at 1012, as to the claims for emotional distress raised in Counts IV and V.

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[1] The majority of the affidavits of both individual defendants consists of denials of many of the factual allegations in the complaint. Powers Affidavits (Docket Nos. 13 and 24); Curtis Affidavit (Docket No. 16). Such denial is inappropriate in the context of a challenge to FTCA certification. *Wood v. United States*, 995 F.2d 1122, 1126 (1st Cir. 1993).

I find the reasoning of the Second Circuit in *McHugh*, which held that sexual harassment is outside the scope of employment under Vermont law, 966 F.2d at 75, to be persuasive in this regard. The Vermont law upon which the Second Circuit relied holds that an employer is not liable for an employee's act unless "the act was done in furtherance of the master's business." *Id*. (citation omitted). This legal definition does not differ significantly from the third element of the Maine definition ("actuated . . . by a purpose to serve the master"). Sexual harassment of a fellow employee does not serve the employer or further its business. The motion to substitute will be denied as to Counts IV and V.

The analysis is somewhat different with regard to Count VI. The alleged defamation appears to be untrue statements made to Judith Coffin's supervisor regarding her competence in performing the functions of her job. Complaint ¶¶ 56-60. It is not at all apparent on the face of the complaint that these alleged comments by the individual defendants were part of the alleged sexual harassment. Even if they were, however, the defamation claim must stand on its own. Comments to an employee's supervisor by other employees concerning that employee's competence on the job are classically within those employees' scope of employment. *Aversa v. United States*, 99 F.3d 1200 (1st Cir. 1996), is dispositive on this issue. Construing New Hampshire law defining the scope of employment, which is essentially similar to Maine law, *id* at 1210, the First Circuit held that conveying information to the public about arrests, indictments and convictions is within the scope of employment of a prosecutor and upheld substitution, *id*. at 1209-13, even though the actual remarks made were "false, misleading, self-serving, unjust and unprofessional," *id.* at 1216. The plaintiff has failed to carry her burden on the challenge to certification as to Count VI.

III. Conclusion

For the foregoing reasons, the defendants' Renewed Motion to Substitute is **GRANTED** as to Count VI of the complaint and otherwise **DENIED**.

Dated this 15th day of May, 1997.

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David M. Cohen
United States Magistrate Judge